NOOR AZMAN ABIDIN A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEALS NO: P-05-21-01-2012
& P-05-27-02-2012] C
24 JULY 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Reduction of charge to one of possession - Conviction and sentence on amended charge - Appeal against - Defence of accused - Accused claimed to have no knowledge of drugs found in bag allegedly belonging to one "Adik" - Whether defence story inherently incredible - Trial judge's analysis of defence story - Whether there were elements of speculation compromising integrity of decision making process - Whether trial judge focused on the character of "Adik" - Whether "Adik" a fictitious character - Whether prosecution succeeded in proving case beyond reasonable doubt - Whether conviction unsafe* D E

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Charge of trafficking, reduced to possession - Defence of accused - Accused claimed to have no knowledge of drugs found in bag allegedly belonging to one "Adik" - Whether defence story inherently incredible - Trial judge's analysis of defence story - Whether there were elements of speculation compromising integrity of decision making process - Whether trial judge focused on the character of "Adik" - Whether "Adik" a fictitious character - Whether prosecution succeeded in proving case beyond reasonable doubt - Whether conviction unsafe* F G

The accused ('the appellant') was charged with trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952'). At the end of the prosecution case, the learned trial judge reduced the charge to one of possession and amended the charge to attract s. 39A(2) DDA 1952. At the end of the defence case, the appellant was convicted and sentenced to 18 years imprisonment and ten strokes of the 'rotan'. The appellant appealed against the said conviction and sentence for H I

A possession and the prosecution appealed against the decision of the learned trial judge for reducing the charge of trafficking to one of possession. Briefly, the facts were that the police had information of a person known as "Adik" who was involved in drug trafficking and had communicated with one officer SP3 (agent B provocateur) on several occasions for the purchase of drugs. However, SP3 had finalised the deal with one "Mat" and had agreed to meet "Mat" at the designated place. "Mat" had come with a yellow coloured bag and was handing over the bag to SP3 when he was arrested and charged. The appellant, known as C "Mat", claimed that the said bag belonged to one Mohd Azuddin ("Adik"), who had asked him to hand over the bag to SP3. It was the appellant's submission that he had no knowledge that the bag contained ganja.

D **Held (allowing appellant's appeal; dismissing prosecution's appeal)**
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

E **(1)** In the instant case, the police information was in relation to one "Adik" and not the appellant ("Mat"). "Adik" was not a fictitious person but the brother of "Mat". The trial judge had not focused his mind on this character "Adik" when the law requires the prosecution to deal with the issue to prove their case beyond reasonable doubt (*Alcontara Ambross Anthony v. PP*, refd). (para 8)

(2) The defence of the appellant was that he had wanted to go to the printers to print wedding cards and that was what he thought he was carrying in the said yellow bag. The defence G story was not inherently incredible, and ought to have been tested with the prosecution's case. The trial judge's analysis of the defence story had elements of speculation which in law and in fact had compromised the integrity of the decision making process. In addition, the perverse statements in actual H fact had compromised the decision making process which according to established principles would attract the jurisprudence relating to unsafe decisions. (paras 7 & 9)

(3) The hallmark of judgment writing in a criminal case is achieved I only when there has been a just and fair assessment of the defence story as long as it is not inherently incredible taking into consideration that it is for the prosecution to prove its case beyond reasonable doubt at the prosecution case as well

as at the defence stage. Lack of proper assessment would in actual fact compromise the integrity of the decision making process, making the conviction unsafe. (para 12)

(4) The issue whether it is safe or unsafe to convict is within the exclusive and subjective jurisdiction of the first appellate court and is not amenable to apex intervention unless it can be demonstrated that the first instant appeal court could not have achieved the said decision, and there is overwhelming evidence to support the conviction beyond reasonable doubt (*Thenagaran Murugan & Anor v. PP*, refd). On the factual matrix of the case herein, it was unsafe to convict. Thus, the appellant was acquitted and discharged. (para 11)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh ('perayu') dituduh mengedar dadah di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB 1952'). Di akhir kes pendakwaan, yang arif hakim bicara telah mengurangkan tuduhan kepada tuduhan milikan dan telah memindanya untuk menarik s. 39A(2) ADB 1952. Di akhir kes pembelaan, perayu telah disabit dan dijatuhkan hukuman penjara 18 tahun dan sepuluh kali sebatan. Perayu merayu terhadap sabitan dan hukuman tersebut dan pihak pendakwaan merayu terhadap keputusan yang arif hakim bicara kerana telah mengurangkan tuduhan pengedaran kepada milikan. Secara ringkas, faktanya adalah bahawa pihak polis telah menerima maklumat berkenaan seorang yang dikenali sebagai "Adik" yang terlibat dengan pengedaran dadah dan telah beberapa kali berkomunikasi dengan satu pegawai SP3 (agen provokatur) untuk menjual beli dadah. Walau bagaimanapun, SP3 telah memuktamadkan perjanjian dengan satu "Mat" dan telah bersetuju untuk berjumpa dengan "Mat" di tempat yang diarahkan. "Mat" telah datang dengan satu beg berwarna kuning dan sedang menyerahkan beg tersebut kepada SP3 apabila beliau ditangkap dan dituduh. Perayu, yang dikenali sebagai "Mat", mendakwa bahawa beg tersebut adalah kepunyaan satu Mohd Azuddin, "Adik", yang telah menyuruh beliau menyampaikan beg tersebut kepada SP3. Ia adalah hujahan perayu bahawa beliau tidak mempunyai pengetahuan bahawa beg tersebut mengandungi ganja.

Diputuskan (membenarkan rayuan perayu; menolak rayuan pendakwaan)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Di dalam kes ini, maklumat pihak polis adalah berkenaan seorang "Adik" dan bukan perayu ("Mat") "Adik" bukan orang rekaan tetapi adalah adik lelaki kepada "Mat". Yang arif hakim bicara gagal memberikan tumpuan kepada watak "Adik" apabila undang-undang menghendaki pihak pendakwaan menangani isu itu untuk membuktikan kes melampaui keraguan munasabah (*Alcontara Ambross Anthony v. PP*, dirujuk).

(2) Pembelaan perayu adalah bahawa beliau ingin ke pencetak untuk mencetak beberapa kad kahwin dan itu yang beliau fikirkan dibawanya di dalam beg kuning tersebut. Pembelaan yang diberi bukannya tidak boleh dipercayai, dan sepatutnya diuji dengan kes pendakwaan. Analisa yang arif hakim bicara berkenaan pembelaan yang diberi mempunyai unsur-unsur spekulasi yang dari segi undang-undang dan fakta telah mengkompromi integriti proses membuat keputusan. Tambahan pula, kenyataan-kenyataan bertentangan yang dibuat telah pada hakikatnya mengkompromi proses membuat keputusan yang menurut prinsip mantap akan membawa kepada jurisprudens berhubungan keputusan yang tidak selamat.

(3) Pencapaian penghakiman dalam kes jenayah diperolehi hanya apabila terdapat penilaian yang adil dan saksama berkenaan apa yang telah diberikan oleh pembelaan selagi ia bukan mustahil dengan pertimbangan ia adalah bagi pihak pendakwaan untuk membuktikan kes mereka melampaui keraguan munasabah di peringkat pendakwaan dan juga di peringkat pembelaan. Kekurangan penilaian yang betul pada hakikatnya akan mengkompromi integriti proses membuat keputusan, dan akan mengakibatkan sabitan tidak selamat.

(4) Isu sama ada ia adalah selamat atau tidak untuk mensabit adalah dalam bidang kuasa eksklusif dan subjektif mahkamah rayuan pertama dan adalah tidak terbuka kepada campur tangan mahkamah atasan melainkan ia dapat menunjukkan bahawa mahkamah rayuan pertama tidak mungkin mencapai keputusan tersebut, dan terdapat keterangan yang kukuh untuk menyokong sabitan melampaui keraguan munasabah (*Thenagaran Murugan & Anor v. PP*, dirujuk). Atas matriks fakta kes ini, ia adalah tidak selamat untuk menyabitkan perayu. Oleh itu, perayu dibebaskan dan dilepaskan.

Case(s) referred to:
Ahmad Mukamal Abdul Wahab & Ors v. PP [2013] 4 CLJ 949 CA ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Munuswamy Sundar Raj v. PP [2013] 1 LNS 183 CA ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
PP v. Thenegaran Murugan & Another Appeal [2013] 4 CLJ 364 CA ***(refd)***
Thenegaran Murugan & Anor v. PP [2013] 5 CLJ 850 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39A(2), 39B(1)(a)

Other source(s) referred to:
Christopher J Emmins, '*A practical approach to Criminal Procedure*', 3rd edn, p 292

For the appellant - Hussaini Abdul Rashid; M/s Husaini & Co
For the respondent - Aslinda Ahad; DPP

[Appeal from High Court, Pulau Pinang; Suit No: 45-33-2011]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's/accused appeal against conviction and sentence for possession, and the prosecution appeal against the decision of the learned trial judge for reducing the charge of trafficking to one of possession of dangerous drugs at the prosecution stage, came up for hearing on 7 May 2013. We heard both the appeals and dismissed the prosecution appeal and allowed the accused appeal. My learned brothers Mohamed Apandi bin Haji Ali JCA and Linton Albert JCA have read the judgment and approved the same. This is our judgment.

[2] In the instant case the accused was charged for trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952'). At the end of the prosecution case the learned trial judge reduced the charge of one relating to possession and amended the charge to attract s. 39A(2) DDA 1952 and called for the defence. At the end of the defence case the accused was convicted and sentenced to 18 years imprisonment and ten strokes of the 'rotan'. The amended charge by the judge under s. 39A(2) reads as follows:

A Bahawa kamu pada 5.1.2011, jam lebih kurang 3.00 petang, di kawasan letak kereta belakang Pasaraya Sunshine, Air Itam, Georgetown, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang telah didapati ada dalam milikan kamu dadah berbahaya iaitu cannabis seberat 1,941 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

B

Brief Facts

C **[3]** The facts of the case is well adumbrated by the learned trial judge in his 27 pages judgment. We do not wish to repeat the same, save for the purpose of the appeal to summarise as follows:

(a) The police had information of a person known as 'Adik' who was involved in drug trafficking, and had also his mobile No. 017-4835772 and one officer SP3 (agent provocateur) had communicated on the said number several times for the purchase of drugs;

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(b) Even though the name known was 'Adik', when SP3 first communicated with the person, the person who replied identified himself as 'Mat'. The various telephone conversations as per evidence were with 'Mat'; and

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(c) SP3 after having finalised the deal with 'Mat' subsequently agreed to meet 'Mat' at the designated place. Mat came with a yellow coloured bag and knocked on the window of the car of SP3 who was waiting to buy the drugs. Subsequently Mat was arrested, and charged.

F

[4] Defence Case

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(i) His brother Mohd Azuddin was known as 'Adik', and he is the one who is the owner of the mobile No. 017-4835772. His mobile no. was 013-4334201; and

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(ii) It was 'Adik' who has asked him to hand over the bag to SP3. When he knocked on the window and when the window was opened he had informed SP3 that 'Adik' had informed that the bag was to be handed over.

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[5] The learned trial judge had captured the defence in the judgment as follows: A

> Thus the trial is to proceed by getting a plea of the accused afresh on the amended charge. Having read and explained the amended charge, the accused maintained his plea of not guilty. The accused gave his evidence on oath. His evidence is this. On 5.1.2011 the accused went to Pasaraya Sunshine to buy milk of S 26 brand for his new born baby. He went there in a Proton Waja motorcar, PFU 8619. The Proton Waja was driven by Mohd. Azuddin. The said motorcar was owned by Noor Azuan. Mohd. Azuddin and Noor Azuan are both the younger brothers of the accused. While on the way to the Pasaraya Sunshine, Mohd. Azuddin was heard talking over the phone to someone but the accused did not understand the conversation. Upon arrival at the Pasaraya Sunshine, Mohd. Azuddin stopped the motorcar in front of its main entrance. At the request of Mohd. Azuddin, the accused took a yellow-coloured bag from inside the motorcar to be handed over to a man waiting in the black motorcar at the parking area. The accused was made to understand by Mohd. Azuddin that the bag contained the latter's wedding invitation cards which were needed to be printed. The accused noticed that there were two wrapped packages in the bag as the "mouth" of the bag was not sealed. The contents in the packages could not be seen. The accused entered the waiting motorcar and delivered the bag to the man in the driver's seat. In doing so, a group of men rushed towards him. Subsequently, he came to know that they were police officers. One of the police officers informed him that he had carried offending goods, to which the accused replied that he carried the wedding cards which were intended to be printed. At the time of his arrest, the accused said there was no scuffle but he was frightened. Mohd. Azuddin sped off in the said Proton Waja motorcar. He was subsequently arrested together with the said motorcar. The accused version that there was no struggle and Mohd. Azuddin bolted away are contrary to the prosecution evidence.
>
> The accused claimed that he had no knowledge that the bag contained ganja. The ganja belonged to Mohd. Azuddin. He was not involved in the sale transaction of the ganja. He refuted Ramesh, SP3 evidence that he had asked to see the money and also Ramesh, SP3 evidence that he wanted to view the drugs first. The accused also denied meeting Ramesh, SP3 behind the said motorcar. According to him, he entered the motorcar to hand over the bag to SP3. Again this is inconsistent with the prosecution evidence.

B C D E F G H I

The accused called his father, Abidin bin Gurameah, SD2 as his witness. SD2 said the accused, Mohd. Abidin and Noor Azuan are his siblings. Mohd. Azuddin was scheduled to get married in March, 2011. SD2 also confirmed that the Proton Waja motorcar, PFQ 8619 was owned by Noor Azman and Mohd. Azuddin used to borrow the said motorcar. Mohd. Azuddin was also arrested by the police and upon his release from police custody, he could not be traced.

From his line of defence, the accused attempted to show that the drugs belonged to Mohd. Azuddin. However, here we are not dealing with ownership of the drugs but we are concerned with legal possession of the same. "The primary legal meaning of "possess" to have possession, as distinct from ownership ... and I think "possession" means possession irrespective of whether the possessor is the beneficial owner" per Taylor J in *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28.

The accused's task is merely to give an explanation to cast reasonable doubt in the prosecution case: And further to rebut the presumption of possession under s. 37(d) which has been activated against him on the balance of probabilities. Having amended the charge at the close of the prosecution's case, trafficking is no longer the issue at this stage. We are only concerned with possession. Knowledge is a constituent element of possession. Without knowledge there cannot be possession but there can be possession without full and exact knowledge. The accused said he had no knowledge of the contents of the yellow-coloured bag. To him the bag which he was carrying, contained wedding invitation cards which were meant to be printed. This is not plausible or probable because of valid and authenticated reasons. Firstly, ordinarily only one piece of card is required as a sample or specimen to have them printed in large quantity. Secondly, the two packages in the bag were fully wrapped up in aluminium and translucent plastic were not, by any stretch of imagination, consistent with the packages which contained the wedding cards. Thirdly, the manner the two packages were wrapped, the wrappers being aluminium sheets and transparent plastic, its rectangular shape, colour, thickness and both packages were of similar size were more consistent with the packages that contained the drugs ganja [please see photographs P6B, C & D]. Fourthly, its weight – about 2 kilogrammes – were fairly heavy to assume the weight of the wedding cards.

Looking at the demeanour and facial expression of the accused while giving evidence in the witness box, I found the accused defence of no knowledge is hard to believe. More so the accused passed the blame to his brother, Mohd. Azuddin who had

mysteriously gone missing. Why must Mohd. Azuddin absconded, if he had nothing to hide. This in itself amounted to a reasonable doubt, argued learned counsel. Several authorities are cited and relied by learned counsel and one of which is *PP v. Ooi Chun Seng* [1991] 1 CLJ 609; [1991] 3 CLJ (Rep) 611. The disappearance of Mohd. Azuddin was seized by the accused to pass the bulk to the former in his defence. I have grave reserrvations to accept his defence or to believe him, having regard to the surrounding circumstances and the probabilities of the case.

It is highly improbable that a large amount of drugs ganja in the bag was "planted" by Mohd. Azuddin, knowing that upon arrest and conviction would attract a death penalty. Mohd. Azuddin would not like that to happen to his brother i.e. the accused, said the father, SD2. Was Mohd. Azuddin a villain? I was of the considered view that he was not. But the accused was.

In the final analysis of the defence case, having regard to the totality of the evidence, the defence has failed to raise a reasonable doubt in the prosecution's case and also failed to rebut the presumption of possession and knowledge under s. 37(d) of the Act which had been activated against the accused when his defence was called on the amended charge.

Accordingly, the accused is found guilty and convicted on the amended charge.

[6] Learned counsel for the accused had filed a lengthy petition of appeal. It will serve no useful purpose to deal with same save to deal with the relevant issues as to whether the conviction is safe.

[7] We have read the appeal record, the petition of appeal and the submission of the parties in detail. We take the view the appeal by the accused must be allowed and the appeal by the prosecution must be dismissed. Our reasons' *inter alia* are as follows:

(i) In the instant case the police information was in relation to 'Adik' and not Mat. In addition 'Mat's' phone number is different from 'Adik'. 'Adik' is not a fictitious person but the brother of 'Mat' whose name was Mohd Azuddin.

(ii) In short the defence story is not inherently incredible, and ought to have been tested with the prosecution case. If it has been tested with the prosecution case, with the application of the Radhi's direction, it is bound to have created a reasonable doubt in the mind of the judge. The learned judge's analysis

of the defence story had element of speculation which in law and fact has compromised the integrity of decision making process. And in addition some of the conclusion of the learned trial judge in our considered view attracts the jurisprudence relating to perverse decision. To name a few are as follows:

(a) The accused version is wanted to go to the printers to print wedding cards and that is what he thought he was carrying. The learned judge's conclusion that only one card is required as a sample or specimen to have them printed in large quantity is not one based on finding of facts.

(b) The comment that Mohd Azuddin would not want his brother to be arrested and convicted for death penalty is also not one of finding of fact and perverse to the accused.

[8] What is important to note is that the learned judge had not focused his mind on this character 'Adik' ie, Mohd Azuddin when the law requires the prosecution to deal with the issue to prove their case beyond reasonable doubt as cases such as *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209 would advocate. (This panel has dealt with similar issues in a number of cases to name a few are as follows: (i) *Ahmad Mukamal Abdul Wahab & Ors v. PP* [2013] 4 CLJ 949; *Munuswamy Sundar Raj v. PP* [2013] 1 LNS 183; [2013] MLJU 373).

[9] We have repeatedly checked the appeal record to see whether the prosecution who commenced the version with the name 'Adik' had led evidence to show 'Adik' and 'Mat' are one and the same person taking into consideration the different mobile numbers on the factual matrix of the case. We found none to pass the maximum evaluation test and evidence to prove the case on the required standard at the prosecution stage as well as the defence stage. In addition, the perverse statements in actual fact had compromised the decision making process which according to established principles will attract the jurisprudence relating to unsafe decision.

[10] We have dealt with the jurisprudence relating to 'unsafe to convict' in a number of judgments. (see *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364). We do not wish to repeat save to quote a passage from the learned author Christopher J Emmins, 3rd edn. at p. 292 '*A practical approach to Criminal Procedure*' which states:

Conviction unsafe or unsatisfactory

The test for whether a conviction is unsafe or unsatisfactory is a subjective one. Each member of the Court of Appeal asks himself". 'Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory?' If he has, then he should be for allowing the appeal; if not, his vote should go against the appellant (see Lord Kilbrandon in *Staffort v. DPP* [1974] AC 878 at p. 912). Lord Kilbrandon was, in fact, paraphrasing what the Court of Appeal had said in the earlier case of *R v. Cooper* [1969] IQB 267, namely that the question for each appeal judge is: 'Do the circumstances of the case leave me with lurking doubts, causing me to wonder whether injustice has been done?'

[11] It must be observed that the issue whether it is safe or unsafe is within the exclusive and subjective jurisdiction of the first appellate court and is not amenable to apex intervention unless it can be demonstrated that the first instant appeal court could not have achieved the said decision, and there is overwhelming evidence to support the conviction beyond reasonable doubt. In *Thenegaran Murugan & Anor v. PP* [2013] 5 CLJ 850; [2013] 3 MLJ 328, this court through Hamid Sultan Bin Abu Backer had this to say:

In our view whether it is a subjective or objective question or test it must in criminal cases be a decision where there is lurking doubt leans in favour of the accused.

[12] The hallmark of judgment writing in criminal case is achieved only when there has been a just and fair assessment of the defence story as long as it is not inherently incredible taking into consideration that it is for the prosecution to prove its case beyond reasonable doubt at the prosecution case as well as the defence stage, notwithstanding the fact where the law may require the defence to rebut the charge on balance of probabilities. Lack of proper assessment will in actual fact compromise the integrity of the decision making process, making the conviction unsafe. The related jurisprudence on assessment of the defence case was eloquently stated by Justice Sharma as early as 1971 in the case of *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 in the following words:

A A conviction cannot be sustained even if the court is satisfied that the prosecution story "may be true" unless and until it is found that the prosecution story "must be true." The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt.

[13] We are of the considered view that on the factual matrix of the case it is unsafe to convict. In consequence the appeal is allowed, conviction and sentence is squashed. The appellant is acquitted and discharged. The prosecution's appeal is dismissed.